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AUTHOR	Martin, Charles Vance
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ABSTRACT

After a decade of debate, numerous Federal Communications Commission (FCC) rulings, and many court decisions, the application of the "fairness doctrine"--an act that mandates objectivity in the presentation of facts concerning controversial issues--remains unsettled. This report discusses issues involved in the application of the fairness doctrine to commercial advertising and summarizes relevant case law. It also examines the debate over the Federal Trade Commission's proposal to force broadcasters to provide free air time to groups or individuals to balance certain advertising claims: those made by cigarette companies, oil companies, army recruiters, and so on. Although the FCC's "Fairness Report" resolved contention to the degree that it limited the fairness doctrine to advertising that seeks to "play an obvious and meaningful role in public debate," it is concluded that the determination of what advertising is "controversial" is still largely subjective. (KS)

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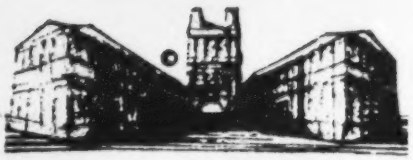

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FREEDOM OF INFORMATION CENTER REPORT NO. 375

FAIRNESS DOCTRINE IN ADVERTISING

This report was written by Charles Vance Martin, an M.A. candidate at the University of Missouri School of Journalism.

The Question

On Aug. 11, 1976, the NBC television network refused (Washington *Post*, 8-12-76) a request from a citizen's group for free air time to reply to a public service announcement on the American economic system. The group claimed NBC was obligated under the fairness doctrine to broadcast the group's counter announcement. But in denying the request, NBC claimed fairness considerations prohibited the network from airing the group's reply. And to make the issue even more complicated, ABC and CBS had refused a month before to carry the original announcement because of fairness doctrine obligations.

This confusing situation points to a serious problem in communications law: after a decade of debate, Federal Communications Commission (FCC) rulings and court decisions, the application of the fairness doctrine to non-political advertising remains unsettled.

In the NBC public service announcement case, four parties interpreted the fairness doctrine in two directly opposing ways. The subject of the flap was a series of advertisements prepared by the Advertising Council that offered the public a booklet purporting to explain the American economy. ABC and CBS refused to air the announcements because network officials felt the spots might fall under the jurisdiction of the fairness doctrine and thereby require the airing of an opposing viewpoint. NBC, on the other hand, did not consider the fairness doctrine applicable to the announcements and agreed to carry them.

Then, the People's Bicentennial Commission, a citizen's group, asked NBC for free air time to reply to the Advertising Council announcements. The commission claimed (*Advertising Age*, 7-19-76) the announcements presented a biased view on a controversial issue, and, therefore, under the fairness doctrine's provisions, NBC was obligated to make reply time available.

The commission prepared its own public service announcements offering its own explanatory booklet. NBC viewed those announcements but refused to broadcast them, pointing to the fairness doctrine as the reason for denial. The commission's announcements were controversial, said (Washington *Post*, 8-12-76) the network's vice president for broadcast standards, and would, under the fairness doctrine, require a response, while the Advertising Council spots were not controversial and did not require a reply.

Why does the application of the fairness doctrine to advertising remain a gray area? The answer lies in the bank of arguments and precedents that has accrued in the 10 years since the doctrine's application to commercial advertising was first recognized and in the phrase "a controversial issue of public importance."

The Fairness Doctrine

In order to investigate this question, it is first necessary to understand the purpose of the fairness doctrine. The geneology of the doctrine extends back to the Radio Act of 1927. Before that year the allocation of broadcast frequencies was left to the public sector. However, it quickly became apparent that, with a limited number of frequencies, chaos would result without regulation. So Congress passed the Radio Act, taking control of the airwaves as public domain and providing for the licensing of broadcasters in the public interest. The Communications Act of 1934 created the Federal Communications Commission to regulate broadcasting in the public interest.

The FCC fulfilled its responsibility by imposing a standard of fairness on broadcasters. The commission required its licensees to permit an equal opportunity for the presentation of oppo ing views on issues of public importance. In its 1949 *Report on Editorializing by Broadcast Licensees*, the commission committed this standard of fairness to writing:

> The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communi-

Summary: The author discusses why, after a decade of debate, FCC rulings and court decisions, the application of the fairness doctrine to commercial advertising continues to be an unsettled issue.

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> cation were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort presentation of such news.[1]

This statement has come to be known as the fairness doctrine. When considering whether the doctrine applies to a subject, the FCC has asked "Is it 'a controversial issue of public importance'?"

As the title of the 1949 report indicates, the doctrine was interpreted primarily to insure the balanced presentation of views in an editorial context. If a position on an issue was aired, alternative positions on that issue had to be allowed presentation.

Advertising Comes Under the Fairness Doctrine

The question of the relation of the fairness doctrine to advertising did not come to public attention until the *CBS-TV, Applicability of the Fairness Doctrine to Cigarette Advertising* case of 1967. In that case the FCC ruled that smoking was a controversial issue of public importance and therefore fell under the doctrine's jurisdiction. To balance the tobacco industry's pro-smoking advertisements, the commission required its licensees to allocate time to public service announcements warning of the hazards of smoking.

The result of this ruling was that FCC licensee stations had to provide free air time for counter advertisements produced by the American Cancer Society. These counter advertisements were spot announcements, usually 30 or 60 seconds long, designed to balance pro-smoking commercials by describing the negative effects of smoking. The spots were aired on a ratio of at least one counter advertisement to five smoking ads.

In issuing its decision, the commission expressly limited its application to cigarette advertising: "We stress that our holding is limited to this product—cigarettes."[2] The commission said the cigarette case was a unique issue of public health, that the FCC did not know of any other product to which the ruling would apply and that the ruling did not imply that "any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance."[3]

The commission's decision was appealed, and in *Banzhaf v. FCC* in 1968, it was upheld by the Court of Appeals for the District of Columbia Circuit. The court also agreed with the FCC that the cigarette case was unique:

> . . . we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the "public health."[4]

Banzhaf Becomes a Precedent

Just two years after the *Banzhaf* decision, another court ruling threw into doubt the commission's policy of restricting the applicability of the fairness doctrine to cigarette advertising alone. In *Retail Store Employees Union v. FCC* in 1970, the same District of Columbia court that had upheld the cigarette decision with the understanding that it was unique said the cigarette ads were *not* unique.[5]

The case concerned advertising by a department store that was the object of a union boycott. The union claimed the store's ads, although they made no mention of the boycott, presented one side of a controversial issue of public importance by promoting the store as a good place to shop. On that premise the union requested air time under the fairness doctrine to counter the store's ads with spots urging shoppers to avoid the store. The FCC denied the request, saying the doctrine did not apply to the store's ads.

The court, however, decided that the store's ads implicity asked the public not to support the union's boycott. Therefore, since the boycott was a controversial issue of public importance, the fairness doctrine did apply, and the union was entitled to reply time.[6]

A second case a year later stretched the applicability of the doctrine to advertising still further. An environmentalist group, Friends of the Earth, claimed that several automobile and gasoline ads broadcast over television stations in the New York City area presented the viewpoint that large engines and high octane gasoline were efficient and clean. The group said big cars and high octane gasoline contributed to the public health hazard posed by air pollution. Therefore, said the group, this issue, like the public health issue in the cigarette case, fell under the fairness doctrine's provisions and required counter advertisements.

In ruling on the case, the FCC drew a distinction between cigarette ads and car and gasoline ads. The commission admitted "a commercial could deal directly with an issue of public importance" and, if so, "the fairness doctrine is fully applicable."[7] But, said the commission, in the cigarette case the government had urged the discontinuance of cigarette use. Since the government was not urging a halt to the use of automobiles or gasolines in this case, the commission ruled no controversial issue was being dealt with directly, and the fairness doctrine did not apply.[8]

The decision was appealed in the courts, and in *Friends of the Earth v. FCC* in 1971 the same District of Columbia court that had ruled in *Banzhaf* and *Employees Union* overruled the FCC. The court said the fairness doctrine was applicable to more than cigarette advertising:

> When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of Banzhaf inescapable.[9]

This ruling set up the issue of public health as a reason for applying the fairness doctrine. The commission, which had sought to limit the *Banzhaf* ruling, was uncomfortable with this precedent.

Other Cases

There were other cases, however, in which the FCC was successful in its attempt to limit the application of the fairness doctrine. In 1970 the commission refused to require counter advertisements, under the fairness doctrine, to balance Army recruiting advertisements. David Green, a college professor, had filed a complaint against two Washington, D.C., television stations, claiming that pro-

military ads raised a controversial issue of public importance and required counter advertisements describing the hazards of military service. The commission rejected the request on the grounds that the need to recruit armed forces was not controversial and anti-war and anti-draft views were given ample exposure in the media.[10]

The decision was appealed and in *Green v. FCC* the court upheld the commission's ruling, noting "It is not every advertisement carrying a controversial message which calls for a response through a similar spot announcement format."[11]

In a May, 1971, ruling the FCC attempted to set down a rationale for restricted fairness doctrine application. The case concerned gasoline advertisements by Standard Oil of California. Two law students acting on behalf of Boalt Hall Environmental Law Society demanded free air time under the fairness doctrine to reply to the gasoline ads. The students charged that the ads, which claimed that a Standard Oil gasoline additive reduced exhaust emissions from dirty engines, presented one side of a controversial issue of public importance.

The commission refused the request for counter advertising time, saying:

> It is true that this claim relates to a matter of public concern, but making such a claim for a product is not the same thing as arguing a position on a controversial issue of public importance.[12]

The Commission went on to say:

> The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy—to name a few examples that readily come to mind—do not rise to the level of a significant public issue.[13]

Commissioner Nicholas Johnson dissented, saying the Standard Oil ads "practically shout that they are dealing with a controversial issue of public importance."[14] The FCC decision was not appealed.

What Is Controversial?

Thus the question of what sort of advertising constitutes a controversial issue of public importance drew attention. Some voices, like that of Nicholas Johnson, argued for a broad interpretation of "a controversial issue of public importance," while the majority of the FCC, as evidenced by the Standard Oil decision, preferred a more narrow scope. The opposing arguments in this debate were clearly delineated in a case decided by the commission just two weeks after the Standard Oil ruling was handed down.

The case involved an attempt by a group of Hunter College students and two professors to secure air time to reply to an Army advertising campaign promoting the advantages of military service. Organized as the Hunter National Students Association Peace Committee, the students and their professors claimed the Army ads did not inform the viewer of the serious disadvantages of military service: possible death, dismemberment and psychological damage. Therefore, the group said, the fairness doctrine requires that time be made available for counter advertisements. "We believed that the danger of the product being advertised (the U.S. Army) sufficiently paralleled the danger in cigarettes to build a plausible case," the group said.[15]

In its complaint the Hunter Committee contended the Army advertisements presented only one side of a controversial issue of public importance. Remembering the FCC ruling in the *Green* case, the Hunter Committee specified the issue in question was not the need for an armed service but the desirability of military service. The complaint maintained the issue was of public significance because of the number of persons affected, the amount of money spent on the campaign, the potential consequences for the individual, the degree of public action and the extent of audience interest.[16]

But the FCC did not view the Army ads as controversial issues of public importance. The commission refused the Hunter Committee's request for reply time, saying recruiting announcements "do not argue on separate issues of public moment."[17] A petition to review the FCC ruling was filed but later withdrawn because the Army advertisement campaign ended.

The FCC Investigates

In an effort to better deal with fairness cases that concerned advertisements, the FCC, late in 1971, initiated an inquiry into the applicability of the fairness doctrine to advertising. There was little problem with clearly editorial advertisements. But ads by organizations not usually involved in public debate, like department stores, oil and car companies and the Army, were causing confusion. In response to the inquiry the Federal Trade Commission (FTC), in January of 1972, submitted to the FCC a statement suggesting that the entire field of broadcast advertising should be strictly subject to the doctrine's obligations.

The FTC statement advocated invoking the doctrine to force broadcasters to give free air time to groups or individuals to air counter advertisements to balance advertising that: (1) asserts claims that raise controversial issues, (2) stresses themes that raise controversial issues, (3) makes claims resting on controversial scientific premises or (4) is silent about its product's negative characteristics.[18] The proposal went a long way toward defining the "controversial issue of public importance" phrasing of the fairness doctrine in the broad manner counter advertising advocates had supported. Under part 4, for example, even the Army recruiting ads that the FCC had maintained were not covered by the fairness doctrine would have required the broadcast of counter advertisements.

The FCC proposal brought forth polemic arguments that forced a re-evaluation of the whole question of how the fairness doctrine applies to advertising. One argument claimed the doctrine ought not to apply to advertising at all, while another supported the FTC proposal for a broad application of the doctrine. The discussion between advocates of these two views had much to do with what was to emerge in 1974 as the FCC's revised policy of applying the doctrine to advertisements.

The Debate on the FTC Proposal

The debate between the two opposing camps centered on four questions: (1) Is the application of the fairness doctrine to advertising constitutional? (2) Is advertising relevant to the intent of the doctrine? (3) Would the public receive more information as a result of the doctrine's

application? and (4) Would the doctrine's obligations be too great a financial burden on broadcasters?

One of the leading spokesmen for those who opposed the application of the fairness doctrine to advertising was former Minnesota Supreme Court Justice Lee Loevinger. It was Loevinger's contention that invoking the fairness doctrine against advertising would be a violation of the First Amendment's guarantee of free speech. He reasoned that if the doctrine were invoked in advertising, licensees would be required to air counter advertisements to balance views expressed in ads that presented a position on an important issue. A government agency, the FCC, would decide what groups would have the opportunity to air their views in the counter advertisements. Since it would be impossible to grant all requests, the commission would, quite naturally, be more favorably disposed to right to reply requests from groups whose ideas were accepted by the commission. Thus, asserted Loevinger, all pretense of free speech vanishes, and the use of government power to promote a particular viewpoint emerges.[19]

Loevinger also argued that the application of the doctrine to advertising is unconstitutional on another ground. In 1936 the Supreme Court held that a tax on newspaper advertisements was prohibited by the First Amendment because it was discriminatory and might result in the destruction of both newspaper ads and newspapers. A move to force broadcasters to air counter advertisements would equally discriminate and so would be equally unconstitutional, Loevinger said.[20]

Those who supported the use of the doctrine in advertising responded to the charge that counter advertisements would be government-controlled by pointing to past practices. Law professor Tom A. Collins argued that the FCC has a history of giving the licensee broad discretion in decision making. In view of this long-standing policy, Collins asserted, the FCC would devise counter advertisement rules which would assure that the ads would not work in an arbitrary manner.[21]

Furthermore, the FTC proposal's backers argued that the intent of the First Amendment is to accord a greater value to the right to receive ideas than to the right of broadcasters and publishers to be independent in their presentation. Proponents of this view pointed to the language of the Court of Appeals for the District of Columbia Circuit in the 1968 cigarette case ruling:

> A political system which assigns vital decisions to individual free choice assumes a well-informed citizenry. We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision. . . .[22]

FTC Chairman Miles Kirkpatrick suggested (*Advertising Age*, 1-31-72) that counter advertisements under the obligations of the fairness doctrine are valuable in providing this right of the public to receive ideas. Consequently, full enforcement of the doctrine in the field of advertising is necessary to the protection of the First Amendment's free speech concept, Kirkpatrick said.

Kirkpatrick also pointed to the Radio Act of 1927 as establishing the broadcast media as different from the print media. Therefore, court rulings concerning the print media have no bearing on broadcast cases, he said. The doctrine in advertising would be neither discriminatory nor unconstitutional, he claimed.

Proponents of the doctrine's application to advertising also stated such a use of the doctrine would come logically from the language and intent of the doctrine. The fairness doctrine was formulated, said Collins, to insure the public a fair opportunity to hear all viewpoints on controversial subjects of importance. Collins supported the contention of the FTC that advertising could either directly or indirectly, by resting upon arguable claims or failing to mention deletorious product effects, deal with controversial subjects of importance. Such advertising, he asserted, violates the criterion of the fairness doctrine.[23]

In the view of some, however, advertising is not relevant to the intent of the doctrine. Loevinger argued that the doctrine, by its wording, applies only to controversial issues of public importance. He said advertising bears not on public issues but on simple consumer decisions. Ads seek to persuade the consumer to buy a particular brand of product, he said, not to propose a position on an issue. The doctrine, he claimed, was not designed to deal with such communication.[24]

Supporters of the doctrine in advertising were convinced that its application to commercials would have a positive impact on the consuming community. Their goal was to regulate advertising so as to provide full and accurate information to the public, said (*Advertising Age*, 1-31-72) Kirkpatrick. The full enforcement of the fairness doctrine in advertising, he said, would accomplish that goal.

Collins pointed to the application of the doctrine to cigarette commercials as an indication of its positive effects. Smoking was an issue of public importance about which the public was not fully informed, he said. The anti-smoking messages, aired as counter advertisements, informed the public of the negative aspects of smoking. These counter ads served to give the public sound information upon which to base an intelligent buying decision, he claimed. The further application of the doctrine to the entire spectrum of advertisements, he argued, would insure that the public is adequately informed on all consumer matters of importance.[25]

The opposers of the application of the doctrine to advertising, however, took quite a different view of its effect on the flow of information to the public if it were indeed applied to advertisements. Loevinger noted that advertisers would want to avoid being subject to counter advertising against their products. Consequently, advertisers would tend to avoid factual claims which might be construed as relating to a controversial issue of public importance. The result would be "safe" advertising that would do little to inform the consumer about the product's qualities. Actually then, the doctrine's application to advertising would limit the amount of information the public is exposed to, he argued.[26]

John A. Schneider, president of the CBS Broadcast Group, also claimed (*Broadcast Daily*, 11-16-72) the doctrine's application to advertising would destroy the economic foundation of broadcasting. Schneider and others pointed to the fact that commercial broadcasting gets 100 per cent of its revenue from advertising. If counter advertising were required, these debaters said, broadcasting's finances would be affected in two ways. First, counter advertising would impose a cost by encroaching on paid ad-

vertising's time. Second, the threat of counter advertising would drive advertisers to other media.

Loevinger argued that if broadcasters were required to make a percentage of their time available for free counter advertising, they would lose revenue they could have earned by selling that time to a paying advertiser. In the cigarette case, licensees were required to air one free counter ad for every five paid cigarette commercials. Loevinger said the television industry's profit margin was 20 per cent and radio's was 10 per cent. If broadcasters were to lose one-sixth of their profits by giving one-sixth of their advertising time away, they would be very nearly out of business, he claimed.[27]

The loss in revenue resulting from advertisers' taking their business to non-broadcast media, the doctrine's opponents asserted, would be even more pervasive. Advertisers would want to avoid being subject to counter advertising, which, by definition, seeks to "unsell" the product. Therefore, they would be inclined to prefer media where they could present their products without fear of counter presentations. Television network executive Frank Stanton adduced the case of cigarette manufacturers, who, faced with counter advertising in the broadcast media in 1967, vigorously supported legislation to prohibit cigarette advertising on radio and television. The cigarette advertisers preferred taking their advertising elsewhere to being exposed to counter ads in the broadcast media, Stanton said.[28]

The overall effect of the application of the doctrine in relation to the economics of broadcasting would be the destruction of broadcasting's financial structure as we know it, the doctrine's opponents said. This would, in turn, result in harm to the public interest, it was claimed. Loevinger argued that, in order to adjust to lost advertising revenue, broadcasters would be forced to curtail services now provided at a loss such as news and public service broadcasts. This would change the face of broadcasting to the public detriment.[29]

The doctrine's supporters in the advertising debate, however, saw little danger of the financial ruin of broadcasting. First, Collins said that although broadcasters would be required to make time available to bona fide counter advertisers free of charge, groups that have the money to pay for their counter ads would do so. Thus, the burden on broadcasters would be reduced.[30]

Second, Collins maintained that revenue loss estimates were exaggerated. The commission would not force an honest licensee out of business, he said. Rather, an economic model would be constructed to determine how much time a licensee could devote to counter advertising. He would not be required to lose money, Collins said. In addition, Collins argued that the fear that revenues would be reduced by the mass exit of advertisers to other media was nearsighted. Only advertisers with something to hide would desert the broadcast media, he said. The exit of dishonest advertisers would enhance the prestige of broadcast time, and honest advertisers would be willing to pay more to air their commercial messages, he said.[31] Consequently, he said, a well-administered application of the doctrine to advertising would not have adverse effects on the broadcast industry's economic structure.

The FCC's Fairness Report

The FCC listened to the feedback it received from its inquiry and from the FTC's response to that inquiry. Then, in July, 1974, the commission released the result of the inquiry—its *Fairness Report*. In the *Fairness Report* the commission confronted the troublesome problem of how licensees and the public could decide under what conditions the fairness doctrine applies to advertising.

The commission rejected the contention that the doctrine ought not apply to any advertising. It said, rather, that the doctrine would apply to an advertisement that seeks to "play an obvious and meaningful role in public debate."[32] The commission also, however, rejected the FTC proposal for a broad application of the doctrine to advertising. It stated that advertising which either made claims resting on controversial scientific premises or was silent about the product's negative characteristics (ads the FTC wanted covered by the doctrine) were more properly covered by policies regulating fraud. Said the commission:

> . . . we do not believe that it is in the public interest to stretch the fairness doctrine in an artificial way by applying it to commercials which play no meaningful or significant role in the debate of controversial issues.[33]

Taking into consideration the fear by some that the fairness doctrine would bring increased government control, the report also delegated to the licensee judgment of what advertising makes a meaningful contribution to public debate.[34] The commission gave notice, however, that it would rule against a licensee not applying the doctrine when the facts warranted.[35]

Finally, the *Fairness Report* withdrew the *Banzhaf v. FCC* case as a precedent. The commission stated it felt the public health issue which had been the criterion for invoking the fairness doctrine in the *Banzhaf* case and in the later *Friends of the Earth* case was a serious departure from the purpose of the doctrine. Therefore, the report stated, future public health cases would be referred to Congress, the doctrine being reserved for issues of public debate.[36]

The Post-Fairness Report Era

The *Fairness Report* did not dramatically alter the relation of the fairness doctrine to advertising as administered by the FCC. Cases following the report were decided in the same manner as those before the report. And there remained disagreement about whether an ad came under the doctrine's provisions.

The most recent case to be given court consideration resulted in a March, 1976, decision against a group that requested air time to reply to snowmobile advertisements. The case involved three Maine residents who claimed the fairness doctrine required WMTW-TV in Poland Spring, Maine, to make time available for a reply to commercials that said snowmobiles would make (Associated Press wire report, 3-23-76) winter "just one big fun-filled season." The three plaintiffs said the commercials did not mention that snowmobiles can be dangerous to riders and others, can destroy wildlife and vegetation and can invade privacy. At the time the Maine legislature was considering controversial legislation to regulate the use and sale of snowmobiles.

The FCC refused the reply time request on the ground that the fairness doctrine did not apply to the snowmobile ads. A circuit court upheld the FCC ruling, stating (Associated Press wire report, 3-23-76) the snowmobile ads were "standard product commercials" not "devoted in an obvious and meaningful way" to discussion of a controversial issue of public importance. The case was appealed to the Supreme Court, the plaintiffs insisting the fairness doctrine did apply. But the high court declined to review the lower court ruling.

As 1976 came to a close, two more fairness doctrine cases were beginning to take shape. The first concerned advertisements by Texaco, Inc. The commercials in question stressed the benefits to consumers of integrated oil companies that produce, refine and market oil products. U.S. Senators Birch Bayh, D-Ind., and James Abourezk, D-S. D., backers of a bill to force the breakup of America's largest oil companies, and the Energy Action Committee, a consumer group, filed suit with the FCC against ABC, NBC and two Washington, D.C., television stations to obtain, under the fairness doctrine, time to reply to the oil company ads. CBS was not named in the suit because that network refused to carry the ads.

ABC and NBC lawyers responded (*Advertising Age*, 8-16-76) to the complaint by saying that although the breakup of oil companies is a controversial issue of public importance, the issue was not specifically addressed in the oil company ads.

On April 5, 1977, the FCC denied the complaint with respect to ABC, NBC and NBC's owned and operated station, WRC-TV, because the ads in question had been presented only a few times and "considerable news and public affairs programming related to divestiture" had been shown.[37] But the commission ruled that WTOP's broadcast of the oil company ads required the station, under the fairness doctrine, to present the views of those favoring oil company divestiture. WTOP agreed (*Variety*, 4-27-77) to make free time available over a three-month period for 30 messages expressing the pro-divestiture viewpoint.

Another case in December also concerned an oil company, this time as plaintiff. Mobil Oil asked (New York *Times*, 12-2-76) WNBC-TV in New York for air time to reply to an ad for the novel *Pipeline*, which, according to Mobil, called the trans-Alaska pipeline a ruthless destruction of Alaska's natural beauty. That case awaits a decision.

Conclusion

The disagreement among the television networks as to whether to broadcast the oil company advertisements returns the discussion to the question: Why does the application of the fairness doctrine to advertising remain a volatile issue? All three networks maintain (Washington *Post*, 8-12-76) a policy against broadcasting an advertisement that falls under the fairness doctrine's jurisdiction. (They do not want to be required to air counter advertisements.) Yet, ABC and CBS refused the Advertising Council's public service announcement on the economy while NBC accepted, and CBS refused the oil company advertisements while ABC and NBC accepted.

An analysis of the development of fairness doctrine policy in advertising indicates the confusion revolves around the phrase "a controversial issue of public importance." This is the test the FCC requires advertisements to pass in order to fall under the fairness doctrine's obligations. It is a subjective test, and there is disagreement as to what advertising can be considered controversial or of public importance.

The FCC has been consistent in its determination of what is a controversial issue of public importance. In most of the significant cases that have come before it since the original Banzhaf complaint, the commission has ruled that the advertisement in question does not directly deal with a controversial issue of public importance and, consequently, does not fall under the doctrine's jurisdiction. But the courts have overruled the FCC on enough occasions to encourage those who desire a wider application of the doctrine to press their complaints. Therefore, although broadcasters can be reasonably confident that they will be supported by the FCC, they are cautious about airing borderline ads. They know that should the case go to the courts, their fate is not so certain.

Another contributing factor is the growing clout of environmentalist and consumer groups that are pushing for increased access to the media. The possibility exists that these groups will be able to secure a guideline of fairness doctrine application similar to that proposed by the FTC.

It is this controversy over what is controversial that has left the fairness issue in advertising unsettled.

The Future

The Maine complainants in the snowmobile case attempted to obtain a ruling from the Supreme Court on what kinds of commercials constitute a controversial issue of public importance. They failed. The Supreme Court has never ruled on this matter. Environmentalist voices, however, are becoming louder, as evidenced by the recent oil company cases. As they are joined by rumblings from groups like the People's Bicentennial Commission, the weight of public opinion may force a Supreme Court decision on the issue.[38]

Possible cases for Supreme Court review in the near future are the Advertising Council public service announcements on the economy, the oil company advertisements and a new Army recruiting campaign which began (*Advertising Age*, 1-3-77) in January, 1977.

A Supreme Court decision could, as a standard, clear up some of the confusion. However, it is doubtful the question of whether an advertisement should fall under the fairness doctrine's jurisdiction can be reduced to an objective test. It is likely to remain an issue open to debate, FCC rulings and court decisions for many years to come.

FOOTNOTES

1. Gloria Swegman Brundage, "Rationale for the Application of the Fairness Doctrine in Broadcast News," *Journalism Quarterly*, Autumn, 1972, pp. 535-36.
2. FCC, "In re Complaint Directed to Station WCBS-TV," 8 FCC 2d 381 (1967).
3. Lee Loevinger, "The Politics of Advertising," *William and Mary Law Review*, Fall, 1973, p. 2.
4. *Banzhaf v. FCC*, 405 F.2d 1082 (1968), cert. denied, 396 U.S. 842 (1969).
5. Loevinger, "The Politics of Advertising," p. 2.
6. *Ibid.*
7. Thomas Asher, "Tanks but No Tanks," *New Republic*, June 26, 1971, p. 17.
8. *Friends of the Earth v. FCC*, 22 RR 2d 2145 (CADC 1971).
9. *Ibid.*
10. William E. Hanks and Martin Lazar, "Using the Fairness Doctrine: Case History of a Learning Project," *Journal of Broadcasting*, Fall, 1972, p. 479.
11. *Green v. FCC*, 22 RR 2d 2022 (CADC 1971) at 2036 and 2037.
12. Asher, "Tanks but No Tanks," p. 17.
13. *Ibid.*, p. 18.
14. *Ibid.*
15. Hanks and Lazar, "Using the Fairness Doctrine," p. 478.
16. *Ibid.*, p. 479.
17. *Ibid.*, p. 481.
18. "Commission Supports Counter-Advertising for Certain Types of Product Commercials," *Federal Trade Commission News*, Jan. 6, 1972, p. 2.
19. Loevinger, "The Politics of Advertising," p. 27.
20. *Ibid.*, p. 12.
21. Tom A. Collins, "Counter-advertising in the Broadcast Media: Bringing the Administrative Process to Bear Upon a Theoretical Imperative," *William and Mary Law Review*, Summer, 1974, p. 810.
22. *Ibid.*
23. *Ibid.*
24. Loevinger, "The Politics of Advertising," p. 9.
25. Collins, "Counter-advertising in the Broadcast Media," p. 801.
26. Loevinger, "The Politics of Advertising," p. 15.
27. *Ibid.*, p. 9.
28. Frank Stanton, "Counter Advertising: The Validity of Broadcasting," *Vital Speeches*, June 15, 1972, p. 526.
29. Loevinger, "The Politics of Advertising," p. 16.
30. Collins, "Counter-advertising in the Broadcast Media," p. 827.
31. *Ibid.*
32. FCC, *Fairness Report*, 48 FCC 2d (1974) at 23.
33. *Ibid.* at 28.
34. *Ibid.* at 23.
35. *Ibid.* at 24.
36. *Ibid.* at 26.
37. *In re Complaint of Energy Action Committee*, 2 Med. L. Rptr. 1623 (1977) at 1634.
38. Nicholas Johnson, *How to Talk Back to Your Television Set* (Boston: Little, Brown and Company, 1970), p. 64.